IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT PETITION OF:	NO. 82363-4
RONNIE JACKSON, JR., Petitioner.	STATE'S RESPONSE TO PETITIONER'S THIRD PERSONAL RESTRAINT PETITION

A. ISSUES PERTAINING TO PERSONAL RESTRAINT PETITION:

1. Should this personal restraint petition be dismissed on procedural grounds as an untimely, repetitive petition?

B. STATUS OF PETITIONER:

Petitioner, RONNIE JACKSON, Jr., is restrained pursuant to a Judgment and Sentence entered in Pierce County Cause No. 96-1-04688-6 after a jury found him guilty of attempted murder in the first degree, robbery in the first degree, and assault in the second degree, and that weapon enhancements were applicable to each crime. Appendix

Office of Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (253) 798-7400

A. The State alleged firearm enhancements in the information upon which petitioner was tried, but the special verdict forms submitted to the jury asked only if petitioner was armed with a deadly weapon. *See* Petitioner's Appendices B and C. The sentencing judge imposed time applicable to firearm enhancements. Appendix A. Petitioner appealed his convictions. In an unpublished decision, the Court of Appeals affirmed his convictions, but directed that all firearm enhancements should run concurrently rather than consecutively. *See* Appendix B. The mandate issued June 8, 2001. *Id.* On October 4, 2002, the trial court re-sentenced petitioner to reflect this directive from the appellate court. Appendix A.

The facts underlying petitioner's crimes are more fully set forth in the appellate decision. Appendix B. The facts show that petitioner tried to rob two men, and in doing so shot one victim twice. After shooting his victim once, petitioner chased his victim into a busy movie theater lobby, firing his gun at least twice during this pursuit. Appendix B.

Petitioner filed his first personal restraint petition (COA Case No. 29058-1-II) raising claims of ineffective assistance of counsel and newly discovered evidence; the Court of Appeals found that these claims had no merit and dismissed the petition on July 8, 2003. *See* Petitioner's Appendix A. Petitioner filed his second personal restraint petition on August 26, 2005, alleging that the trial court erred in imposing "firearm" enhancements when the special verdicts returned by the jury found that he was armed with a "deadly weapon" in violation of his Sixth Amendment right to a jury as articulated in ***Blakely v. Washington***, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004), and ***State v. Recuenco***, 154 Wn.2d 156, 110 P.3d 188 (2005), *reversed* ***Washington v. Recuenco***, 546 U.S. 1166, 126 S. Ct. 1317, 164 L.Ed.2d 45 (2006). The Court of Appeals dismissed the

Office of Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (253) 798-7400

petition, finding that as the principles announced in ***Blakely*** were not to be applied retroactively on collateral review, that petitioner had failed to show an applicable exception to the time bar under RCW 10.73.090 and 10.73.100. *See* Petitioner's Appendix A. It dismissed the petition as time-barred. *Id.*

Petitioner has now filed a third personal restraint petition alleging once again that imposition of firearm enhancements was improper, and that his enhancements should be deadly weapon enhancements asserting that his case is "virtually identical" to that in ***State v. Recuenco***, 163 Wn.2d 428, 180 P.3d 1276 (2008).

Petitioner does not claim to be indigent.

C. ARGUMENT:

I. THE PETITION IS AN UNTIMELY THIRD PETITION THAT SHOULD BE DISMISSED.

Personal restraint procedure came from the State's habeas corpus remedy, which is guaranteed by article 4, § 4 of the State Constitution. ***In re Hagler***, 97 Wn.2d 818, 823, 650 P.2d 1103 (1982). Collateral attack by personal restraint petition is not, however, a substitute for direct appeal. *Id.* at 824. "Collateral relief undermines the principles of finality of litigation, degrades the prominence of the trial, and sometimes costs society the right to punish admitted offenders." *Id.* (citing ***Engle v. Issac***, 456 U.S. 107, 102 S. Ct. 1558, 71 L.Ed.2d 783 (1982)). These costs are significant and require that collateral relief be limited in state as well as federal courts. ***Hagler***, 97 Wn.2d at 824.

Because of the costs and risks involved, there is a time limit in which to file a collateral attack. The statute that sets out the time limit provides:

> No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.

Office of Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (253) 798-7400

RCW 10.73.090(1). In addition to the exceptions listed within that statute, there are other specific exceptions to the one-year time limit for collateral attack:

> The time limit specified in RCW 10.73.090 does not apply to a petition or motion that is based solely on one or more of the following grounds:
>
> > (1) Newly discovered evidence, if the defendant acted with reasonable diligence in discovering the evidence and filing the petition or motion;
> > (2) The statute that the defendant was convicted of violating was unconstitutional on its face or as applied to the defendant's conduct;
> > (3) The conviction was barred by double jeopardy under Amendment V of the United States Constitution or Article I, section 9 of the State Constitution;
> > (4) The defendant pled not guilty and the evidence introduced at trial was insufficient to support the conviction;
> > (5) The sentence imposed was in excess of the court's jurisdiction; or
> > (6) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal or civil proceeding instituted by the state or local government, and either the legislature has expressly provided that the change in the law is to be applied retroactively, or a court, in interpreting a change in the law that lacks express legislative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard.

RCW 10.73.100.

In the instant case, the petitioner's judgment became final on October 4, 2002, the day the corrected judgment was entered in the trial court. *See*, Appendix A. RCW 10.73.090(3)(a). The petitioner filed this personal restraint petition on November 3, 2008, over six years too late.

A petitioner bears the burden of proving that his petition falls within an exception to the one-year time limit. ***Shumway v. Payne***, 136 Wn.2d 383, 399-400, 964 P.2d 349 (1998). To meet that burden of proof, the petitioner must state the applicable exception

Office of Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (253) 798-7400

within the petition. ***In re Stoudmire***, 145 Wn.2d 258, 267, 36 P.3d 1005 (2001)(*Stoudmire II*).

If the court independently reviews a petition filed more than one year after finality, the issues within it must necessarily fall within one of three categories: 1) no exception applies, and issue is time barred; 2) issue is allowed under an exception listed in RCW 10.73.100; 3) issue is allowed under an exception listed in RCW 10.73.090(1). The exceptions found in RCW 10.73.090 are that the court lacked jurisdiction or that the judgment is facially invalid. This Court addressed what makes a judgment facially invalid under RCW 10.73.090:

> Under this statute, the "facial invalidity" inquiry is directed to the judgment and sentence itself. "Invalid on its face" means the judgment and sentence evidences the invalidity without further elaboration.

In re Personal Restraint of Hemenway, 147 Wn.2d 529, 532, 55 P.3d 615 (2002); *see also*, ***In re Personal Restraint Petition of Goodwin***, 146 Wn.2d 861, 50 P.3d 618 (2002) (court could properly consider petitioner's challenge to offender score (miscalculated upward) because judgment listed washed out juvenile convictions which had been used in the calculation of the offender score, thereby rendering the judgment "facially invalid").

Once the court determines that no exception in RCW 10.73.090 applies, the court determines if all of the issues in the petition fall within the exceptions listed in RCW 10.73.100; if so, the court hears the entire petition on its merits. *See*, ***In re Stoudmire***, 141 Wn.2d 342, 348-52, 5 P.3d 1240 (2000) ("*Stoudmire I*"). If none of the issues fall into any exception, the entire petition is dismissed. *Stoudmire I*, at 350-51. If some, but not all, of the issues raised fall within the exceptions in RCW 10.73.100, the petition is considered a "mixed petition". *Stoudmire I*, at 349. A petitioner who files a mixed petition is not

Office of Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (253) 798-7400

entitled to have the court consider claims which fall under an exception in RCW 10.73.100; rather the petition must be dismissed. ***In re Personal Restraint Petition of Hankerson***, 149 Wn.2d 695, 702, 72 P.3d 703 (2003)("if a personal restraint petition claiming multiple grounds for relief is filed after the one-year period of RCW 10.73.090 expires, and the court determines that at least one of the claims is time barred, the petition must be dismissed."); ***In re Personal Restraint Petition of Stenson***, 150 Wn.2d 207, 76 P.3d 241 (2003).

As will be more fully discussed below, this court should dismiss the petition for being untimely.

a. Because The Judgment Is Not Facially Invalid, The Time Bar Is Applicable

Petitioner contends that the judgment is facially invalid because on the judgment it describes the crime committed in Count I as "ATTEMPTED MURDER IN THE FIRST DEGREE/DWSE, Charge Code: (D1DW-A)." Appendix A. He asserts that the incongruity between the "DWSE" (meaning "deadly weapon special enhancement") included in the title of the crime, compared with the other notations on the judgment that indicate the jury found a firearm enhancement results in a facially invalid judgment. He cites no authority that this renders the judgment invalid. Petitioner relies upon cases that hold that judgments that include washed out juvenile convictions in the calculation of the offender score are facially invalid. Because petitioner's judgment does not include washed out juvenile convictions, his authority is not controlling. Here, the judgment indicates that the jury found a firearm enhancement on all three counts in paragraph 2.1. Appendix A. It indicates that a firearm enhancement is applicable to all three counts in paragraph 2.3 and imposes enhancement time consistent with a firearm enhancement in paragraph 4.2(b). *Id.*

Office of Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (253) 798-7400

Unlike judgments that include washed out juvenile convictions which make it apparent that the resulting sentence is based upon an improper offender score, petitioner's judgment does not conclusively reveal an improper, and therefore, invalid sentence. Here, the identification of attempted murder in the first degree as the crime committed under Count I is followed by language that is surplusage. The surplusage includes the "DWSE" designation, as well as the identification of the prosecutor's charging code. This information could have been omitted entirely without any ill effect on the validity of the judgment. Error in these non-critical aspects of the judgment do not render an otherwise valid judgment invalid. Petitioner has failed to prove facial invalidity.

b. Because The State Alleged Firearm Enhancements In The Information, The Decision In ***Recuenco III*** Is Not Controlling And Petitioner Has Failed To Show A Change In The Law Exception To The Time Bar Or For Filing A Petition Which Reraises A Claim Previously Rejected.

Back in 1996, the provisions governing firearm and deadly weapon enhancement were controlled by former RCW 9.94A.310. *See*, Appendix C for full text of statute. Firearm enhancements were governed by subsection (3) which provided, in the relevant part:

> The following additional times shall be added to the presumptive sentence for felony crimes committed after July 23, 1995, if the offender or an accomplice ***was armed with a firearm as defined in RCW 9.41.010*** and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any firearm enhancements based on the classification of the completed felony crime. ...
>
> (a) Five years for any felony defined under any law as a class A felony ...
>
> (b) Three years for any felony defined under the laws as a class B felony...

Office of Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (253) 798-7400

...

Former RCW 9.94A.310(3)(emphasis added); Appendix C. In contrast, deadly weapon enhancements were controlled by subsection (4) which provided, in the relevant part:

> The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice ***was armed with a deadly weapon other than a firearm as defined in RCW 9.41.010*** and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any deadly weapon enhancements based on the classification of the completed felony crime. ...
>
> (a) Two years for any felony defined under any law as a class A felony ...
>
> (b) One year for any felony defined under the law as a class B felony...
> ...

Former RCW 9.94A.310(4)(emphasis added); Appendix C. Under former RCW 9.94A.125, the jury is given a special verdict form to determine the existence of any enhancements. *See*, Appendix D. The additional time for any deadly weapon or firearm enhancement was added to the presumptive sentencing range under former RCW 9.94A.370. *See*, Appendix E.

In the case now before the court, the jury returned special verdicts pertaining to petitioner's convictions for attempted murder in Count I, assault in the second degree in Count II, and robbery in the first degree in Count III. Petitioner's Appendix C. On each count, the language in the information alleging the firearm enhancements followed the charging language for the substantive crime; some of these crimes contained elements that included use of a deadly weapon. Petitioner's Appendix B. After setting forth the charging elements for the attempted murder in Count I the information alleged:

> ...and in the commission thereof, or in the immediate flight therefrom, the defendant or an accomplice was armed with a deadly weapon, to wit: a handgun ***that being a firearm as defined in RCW 9.41.010, and invoking***

Office of Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (253) 798-7400

> ***the provisions of RCW 9.94A.310*** and adding additional time to the presumptive sentence as provided in RCW 9.94A.370...

Petitioner's Appendix B (emphasis added). Petitioner was found guilty of assault in the second degree on Count II, which was a lesser degree of an alternative charge of assault in the first degree. After setting forth the charging elements for assault in the first degree which included use of a firearm or deadly weapon, the information alleged:

> ***that being a firearm as defined in RCW 9.41.010, and invoking the provisions of RCW 9.94A.310*** and adding additional time to the presumptive sentence as provided in RCW 9.94A.370...

Id. (emphasis added). After setting forth the elements of robbery in the first degree in Count III, which included being armed with a deadly weapon, the information alleged:

> ***that being a firearm as defined in RCW 9.41.010, and invoking the provisions of RCW 9.94A.310*** and adding additional time to the presumptive sentence as provided in RCW 9.94A.370...

Id. (emphasis added). In all three instances, the State alleged the enhancements using language that mirrored the provisions of former RCW 9.94A.310(3) pertaining to firearm enhancements. Moreover, the charging language was inconsistent with the language of former RCW 9.94A.310(4) pertaining to deadly weapon enhancements. The information provided petitioner specific notice that the State was seeking an enhanced sentence for use of a firearm as opposed to a deadly weapon. The firearm enhancements were sufficiently charged in the information.

Petitioner relies upon this court's recent decision in ***State v. Recuenco***, 163 Wn. 2d 428, 180 P.3d 1276 (2008) (***Recuenco III***), and asserts that his case is "legally indistinguishable from Recuenco's case." Petition at p. 5. He is incorrect. Recuenco was charged by information with second degree assault "with a deadly weapon, to-wit: a handgun" pursuant to former RCW 9.94A.125 (1983), and former RCW 9.94A.310

Office of Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (253) 798-7400

(1999)." ***State v. Recuenco***, 163 Wn.2d at 431. The court found that this language was insufficient to allege anything more than a deadly weapon enhancement. As set forth above, the information in petitioner's case specifically used language that notified him that the State was seeking a firearm enhancement under former RCW 9.94A.310(3), rather than a deadly weapon enhancement under former RCW 9.94A.310(4). The wording of petitioner's information is clearly distinguishable from that in ***Recuenco III***. Moreover, Petitioner is seeking collateral relief whereas ***Recuenco III*** was on direct appeal. Petitioner's legal situation is not at all akin to Mr. Recuenco's.

As the State properly alleged firearms enhancements in the charging document, the error that occurred in this case is not one of deficient charging, but rather an ***Apprendi/Blakely***[1] error; the jury returned verdicts for an unspecified "deadly weapon", and the sentencing court imposed firearm enhancements based upon the evidence presented at trial. This is precisely the issue petitioner raised in his second personal restraint petition. *See* Petitioner's Appendix A. The Court of Appeals dismissed that petition, citing a decision of this court holding that "neither ***Apprendi*** nor ***Blakely*** applies retroactively on collateral review. *Id.*; *see also*, ***State v. Evans***, 154 Wn.2d 438, 442, 114 P.3d 627 (2005).

Both RAP 16.4(d) and RCW 10.73.140 limit successive personal restraint petitions. While RCW 10.73.140 applies only to the Court of Appeals, petitioner must comply with RAP 16.4(d) in both the Court of Appeals and the Supreme Court. ***In re PRP of Johnson***, 131 Wn.2d 558, 566, 933 P.2d 1019(1997). RAP 16.4(d) puts limits on successive petitions. It provides: "No more than one petition for similar relief on behalf of the same petitioner will be entertained without good cause shown." The Washington Supreme Court

---

[1] ***Apprendi v. New Jersey***, 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000); ***Blakely v. Washington***, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004).

Office of Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (253) 798-7400

adopted the United States Supreme Court's definition of "similar relief" found in a statute containing language very similar to RAP 16.4(d). ***In re Personal Restraint of Haverty***, 101 Wn.2d 498, 503, 681 P.2d 835 (1984), citing ***Sanders v. United States***, 373 U.S. 1, 15, 17, 83 S. Ct. 1068, 1077, 1078, 10 L.Ed.2d 148 (1963). The phrase "similar relief" relates to the grounds for the relief, rather than the type of relief sought. ***In re PRP of Johnson***, 131 Wn.2d 558, 564, 933 P.2d 1019 (1997); *see also*, ***In re Personal Restraint of Jeffries***, 114 Wn.2d 485, 488-89, 789 P.2d 731 (1990). The only limit to the Supreme Court's reconsideration of a previously raised issue is the "good cause" requirement of RAP 16.4(d), which will ordinarily bar a petitioner from filing successive petitions seeking relief on the same grounds, in the absence of a showing of good cause. The Supreme Court has held that a petitioner demonstrates good cause for advancing the same grounds for relief under the rule when there has been a "significant, intervening change in the law [which] may occur as a result of a decision by this court." ***Johnson***, 131 Wn.2d at 567; *see also* ***Jeffries***, 114 Wn. 2d at 488; Taylor, 105 Wn. 2d at 688. "Simply 'revising' a previously rejected legal argument . . . neither creates a 'new' claim nor constitutes good cause to reconsider the original claim." ***In re Jeffries***, 114 Wn.2d 485, 488, 789 P.2d 731 (1990). A petitioner may not create a different ground for relief merely by alleging different facts, asserting different legal theories, or couching his argument in different language. ***Lord***, 123 Wn.2d at 329. One appellate court has already rejected petitioner's claimed ***Blakely*** violation. There is no reason to relitigate that claim.

In the instant case, petitioner has tried to recast his ***Blakely*** issue into one involving faulty charging. He fails because the wording of his information put him on notice that the

Office of Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (253) 798-7400

State was seeking firearm enhancements. The error that occurred in his case is a ***Blakely*** error, but that provides him no relief on collateral review.

D. CONCLUSION:

This court should dismiss the petition as an untimely, repetitive petition.

DATED: February 6, 2009.

GERALD A. HORNE
Pierce County Prosecuting Attorney

KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail to the petitioner a true and correct copy of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

2-6-09 Theresa Lu
Date Signature

743210

Office of Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (253) 798-7400

APPENDIX "A"

Judgment and Sentence

96-1-04688-6 17392156 JDSWCD 10-07-02

CERTIFIED COPY

FILED
DEPT. 19
IN OPEN COURT
OCT 04 2002
Pierce County Clerk
By _____ DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,

Plaintiff,

vs.

RONNIE JACKSON, JR.,

Defendant.

CAUSE NO. 96-1-04688-6

WARRANT OF COMMITMENT
Upon Re-Sentencing

1) [ ] County Jail
2) [✓] Dept. of Corrections
3) [ ] Other - Custody

OCT - 7 2002

THE STATE OF WASHINGTON TO THE DIRECTOR OF ADULT DETENTION OF PIERCE COUNTY:

WHEREAS, Judgment has been pronounced against the defendant in the Superior Court of the State of Washington for the County of Pierce, that the defendant be punished as specified in the Judgment and Sentence/Order Modifying/Revoking Probation/Community Supervision, a full and correct copy of which is attached hereto.

[ ] 1. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Pierce County Jail).

[✓] 2. YOU, THE DIRECTOR, ARE COMMANDED to take and deliver the defendant to the proper officers of the Department of Corrections; and

YOU, THE PROPER OFFICERS OF THE DEPARTMENT OF CORRECTIONS, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Department of Corrections custody).

Office of Prosecuting Attorney
946 County-City Building
Tacoma, Washington 98402-21
Telephone: (253) 798-7400

[ ] 3. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement or placement not covered by Sections 1 and 2 above).

By direction of the Honorable

Dated: Oct. 4, 2002

Mary Jane Vandeen
JUDGE

BOB SAN SOUCIE
CLERK

By: Chris Hutton
DEPUTY CLERK

CERTIFIED COPY DELIVERED TO SHERIFF

Date OCT - 7 2002 By: Chris Hutton Deputy

FILED
DEPT. 19
IN OPEN COURT
OCT 04 2002
Pierce County Clerk
By DEPUTY

STATE OF WASHINGTON, County of Pierce
ss: I, Bob San Soucie, Clerk of the above entitled Court, do hereby certify that this foregoing instrument is a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I hereunto set my hand and the Seal of Said Court this
_____ day of _____, 19___.

BOB SAN SOUCIE, Clerk
By:_____ Deputy

STATE OF WASHINGTON, County of Pierce
ss: I, Kevin Stock, Clerk of the above entitled Court, do hereby certify that this foregoing instrument is a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I hereunto set my hand and the Seal of said Court this
_____ day of FEB 06 2009, 20___
Kevin Stock, Clerk
By_____ Deputy

CERTIFIED COPY

Office of Prosecuting Attorney
946 County-City Building
Tacoma, Washington 98402-21
Telephone: (253) 798-7400

CERTIFIED COPY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,

Plaintiff,

vs.

RONNIE JACKSON, JR.

Defendant.

DOB: 8/19/75
SID NO.: WA16423591
LOCAL ID:

CAUSE NO. 96-1-04688-6

JUDGMENT AND SENTENCE
(FELONY/OVER ONE YEAR)

Re-Sentencing

OCT - 7 2002

I. HEARING

1.1 A Re-sentencing hearing in this case was held on Oct. 4, 2002.

1.2 The defendant, the defendant's lawyer, ERIK BAUER, and the deputy prosecuting attorney, KAWYNE A. LUND, were present.

II. FINDINGS

There being no reason why judgment should not be pronounced, the court FINDS:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on NOV. 3, 1997 by

96-9-04807-8

Office of Prosecuting Attorney
946 County-City Building
Tacoma, Washington 98402-21
Telephone: (253) 798-7400

96-1-04688-6

[ ] plea [X] jury-verdict [ ] bench trial of:

Count No.: I
Crime: ATTEMPTED MURDER IN THE FIRST DEGREE/DWSE, Charge Code: (D1DW-A)
RCW: 9.94A.125, 9.94A.310, 9.94A.370, 9A.32.030(1)(a), 9A.28.020
Date of Crime: 10/22/96
Incident No.: 96-2961024

Count No.: II
Crime: ROBBERY IN THE FIRST DEGREE/FASE, Charge Code: (AAA1)
RCW: 9A.56.190, 9A.56.200(1)(a)
Date of Crime: 10/22/96
Incident No.: 96-2961024

Count No.: III
Crime: ASSAULT IN THE SECOND DEGREE/FASE, Charge Code: (E28)
RCW: 9A.36.021(1)(c)
Date of Crime: 10/22/96
Incident No.: 96-2961024

[ ] Additional current offenses are attached in Appendix 2.1.
[ ] A special verdict/finding for use of deadly weapon other than a firearm was returned on Count(s).
[✓] A special verdict/finding for use of a firearm was returned on Counts I, II, & III.
[ ] A special verdict/finding of sexual motivation was returned on Count(s)_____.
[ ] A special verdict/finding of a RCW 69.50.401(a) violation in a school bus, public transit vehicle, public park, public transit shelter or within 1000 feet of a school bus route stop or the perimeter of a school grounds (RCW 69.50.435).
[ ] Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

[✓] Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.400(1)):
Counts: Attempted Murder 1° and Robbery 1°.

2.2 CRIMINAL HISTORY: Prior convictions constituting criminal history for purposes of calculating the offender score are (RCW 9.94A.360):

Office of Prosecuting Attorney
946 County-City Building
Tacoma, Washington 98402-21
Telephone: (253) 798-7400

CRIME	DATE OF SENTENCING	SENTENCING COUNTY/STATE	DATE OF CRIME	ADULT OR JUV.	CRIME TYPE	CRIME ENHANCEMENT
ATT ROB 2	2/15/91		11/21/90	J	V	
ESC 1	2/12/92		7/10/91	J	NV	
CON UDCS		KITSAP		A	NV	
ROB1/FASE	CURRENT			A		5YR
ASLT2/FASE	CURRENT			A		3 YR

[ ] Additional criminal history is attached in Appendix 2.2.
[ ] Prior convictions served concurrently and counted as one offense in determining the offender score are (RCW 9.94A.360(5)(a)):

2.3 SENTENCING DATA:

	Offender Score	Serious Level	Standard Range(SR)	Enhancement	Maximum Term
Count I:	Att Mur (5)	XIV	218.25-291	Yes - FA	LIFE
Count II:	Aslt 2 (5)	IV	22-29	Yes - FA	10YRS/$20,000
Count III:	Rob 1 (5)	IX	57-75	Yes - FA	LIFE

[ ] Additional current offense sentencing data is attached in Appendix 2.3.

2.4 EXCEPTIONAL SENTENCE:

[ ] Substantial and compelling reasons exist which justify an exceptional sentence

[ ] above [ ] within [ ] below the standard range for Count(s) _____.
Findings of fact and conclusions of law are attached in Appendix 2.4. The Prosecuting Attorney [ ] did [ ] did not recommend a similar sentence.

2.5 RECOMMENDED AGREEMENTS:

Office of Prosecuting Attorney
946 County-City Building
Tacoma, Washington 98402-21
Telephone: (253) 798-7400

[✓] For violent offenses, serious violent offenses, most serious offenses, or any felony with a deadly weapon special verdict under RCW 9.94A.125; any felony with any deadly weapon enhancements under RCW 9.94A.310(3) or (4) or both; and/or felony crimes of possession of a machine gun, possessing a stolen firearm, reckless endangerment in the first degree, theft of a firearm, unlawful possession of a firearm in the first or second degree, and/or use of a machine gun, the recommended sentencing agreements or plea agreements are [ ] attached [✓] as follows: High end, (after same criminal conduct finding) ± exceptional sent.

2.6 RESTITUTION:

[ ] Restitution will not be ordered because the felony did not result in injury to any person or damage to or loss of property.

[ ] Restitution should be ordered. A hearing is set for _____.

[ ] Extraordinary circumstances exist that make restitution inappropriate. The extraordinary circumstances are set forth in Appendix 2.5.

[ ] Restitution is ordered as set out in Section 4.1, LEGAL FINANCIAL OBLIGATIONS.

[✓] Restitution was previously ordered and is unchanged.

2.7 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS: The court has considered the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court specifically finds that the defendant has the ability to pay:

[ ] no legal financial obligations.
[✓] the following legal financial obligations:
[✓] crime victim's compensation fees.
[✓] court costs (filing fee, jury demand fee, witness costs, sheriff services fees, etc.)
[ ] county or inter-local drug funds.
[ ] court appointed attorney's fees and cost of defense.
[ ] fines.
[ ] other financial obligations assessed as a result of the felony conviction.

A notice of payroll deduction may be issued or other income-withholding action may be taken, without further notice to the offender, if a monthly court-ordered legal financial obligation payment is not paid when due and an amount equal to or greater than the amount payable for one month is owed.

III. JUDGMENT

3.1 The defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1 and Appendix 2.1.

3.2 [ ] The court DISMISSES.

Office of Prosecuting Attorney
946 County-City Building
Tacoma, Washington 98402-21
Telephone: (253) 798-7400

96-1-04688-6

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 LEGAL FINANCIAL OBLIGATIONS. Defendant shall pay to the Clerk of this Court:

$ →, Restitution to: See previous order.

$ 110.00, Court costs (filing fee, jury demand fee, witness costs, sheriff service fees, etc.);

$ 500.00, Victim assessment;

$ _____, Fine; [ ] VUCSA additional fine waived due to indigency (RCW 69.50.430);

$ _____, Fees for court appointed attorney;

$ _____, Washington State Patrol Crime Lab costs;

$ _____, Drug enforcement fund of _____;

$ _____, Other costs for: _____;

$ 610.00, TOTAL legal financial obligations [ ] including restitution [✓] not including restitution.

[ ] Minimum payments shall be not less than $_____ per month. Payments shall commence on _____.

[✓] The Department of Corrections shall set a payment schedule.

[✓] Restitution ordered above shall be paid jointly and severally with:

Name	Cause Number
Tyler Williams	97-1-00223-2
Donna Santiago	96-1-04719-0

Office of Prosecuting Attorney
946 County-City Building
Tacoma, Washington 98402-21
Telephone: (253) 798-7400

96-1-04688-6

The defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to ten years from the date of sentence or release from confinement to assure payment of the above monetary obligations.

Any period of supervision shall be tolled during any period of time the offender is in confinement for any reason.

Defendant must contact the Department of Corrections at 755 Tacoma Avenue South, Tacoma upon release or by _____.

[ ] Bond is hereby exonerated.

4.2 CONFINEMENT OVER ONE YEAR: The defendant is sentenced as follows:

(a) CONFINEMENT: (Standard Range) RCW 9.94A.400. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections:

264 months on Count No. I (Att Murder) [✓] concurrent [ ] consecutive
29 months on Count No. II (A20) [✓] concurrent [ ] consecutive
75 months on Count No. III (Rob 1) [✓] concurrent [ ] consecutive
_____ months on Count No. _____ [ ] concurrent [ ] consecutive

(b) CONFINEMENT (Sentence Enhancement): A special finding/verdict having been entered as indicated in Section 2.1, the defendant is sentenced to the following additional term of total confinement in the custody of the Department of Corrections:

60 MONTHS ON COUNT I
36 MONTHS ON COUNT II
60 MONTHS ON COUNT III
_____ MONTHS ON COUNT _____

TOTAL MONTHS CONFINEMENT ORDERED: 264 + 60 Flat Time

Sentence enhancements in Counts I, II, & III shall run
[✓] concurrent [ ] consecutive to each other.
Sentence enhancements in Counts I, II, & III shall be served
[✓] flat time [ ] subject to earned good time credit.

Standard range sentence shall be [ ] concurrent [ ] consecutive with the sentence imposed in Cause Nos.: _____.

[✓] Credit is given for previous PCJ certificate days served; plus all time served since prior sentencing of May 18, 199

Office of Prosecuting Attorney
946 County-City Building
Tacoma, Washington 98402-21
Telephone: (253) 798-7400

4.3 [✓] COMMUNITY PLACEMENT (RCW 9.94A.120). The defendant is sentenced to community placement for [ ] one year [✓] two years or up to the period of earned early release awarded pursuant to RCW 9.94A.150(1) and (2), whichever is longer.

[ ] COMMUNITY CUSTODY (RCW 9.94A.120(1). Because this was a sex offense that occurred after June 6, 1996, the defendant is sentenced to community custody for **three years or up to the period of earned early release awarded pursuant to RCW 9.94A.150(1) and (2), whichever is longer.**

While on community placement or community custody, the defendant shall: 1) report to and be available for contact with the assigned community corrections officer as directed; 2) work at Department of Corrections-approved education, employment and/or community service; 3) not consume controlled substances except pursuant to lawfully issued prescriptions; 4) not unlawfully possess controlled substances while in community custody; 5) pay supervision fees as determined by the Department of Corrections; 6) residence location and living arrangements are subject to the approval of the department of corrections during the period of community placement.

(a) [ ] The offender shall not consume any alcohol;

(b) [✓] The offender shall have no contact with: victims or their immediate families

(c) [ ] The offender shall remain [ ] within or [ ] outside of a specified geographical boundary, to-wit:

(d) [ ] The offender shall participate in the following crime related treatment or counseling services:

(e) [ ] The defendant shall comply with the following crime-related prohibitions:

(f) [ ] OTHER SPECIAL CONDITIONS AND CRIME RELATED PROHIBITIONS:

Office of Prosecuting Attorney
946 County-City Building
Tacoma, Washington 98402-21
Telephone: (253) 798-7400

(g) [ ] HIV TESTING. The Health Department or designee shall test the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing. (RCW 70.24.340)

(h) [✓] DNA TESTING. The defendant shall have a blood sample drawn for purpose of DNA identification analysis. The Department of Corrections shall be responsible for obtaining the sample prior to the defendant's release from confinement. (RCW 43.43.754)

[ ] PURSUANT TO 1993 LAWS OF WASHINGTON, CHAPTER 419, IF OFFENDER IS FOUND TO BE A CRIMINAL ALIEN ELIGIBLE FOR RELEASE AND DEPORTATION BY THE UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, SUBJECT TO ARREST AND REINCARCERATION IN ACCORDANCE WITH THIS LAW, THEN THE UNDERSIGNED JUDGE AND PROSECUTOR CONSENT TO SUCH RELEASE AND DEPORTATION PRIOR TO THE EXPIRATION OF THE SENTENCE.

EACH VIOLATION OF THIS JUDGMENT AND SENTENCE IS PUNISHABLE BY UP TO 60 DAYS OF CONFINEMENT. (RCW 9.94A.200(2)).

FIREARMS: PURSUANT TO RCW 9.41.040, YOU MAY NOT OWN, USE OR POSSESS ANY FIREARM UNLESS YOUR RIGHT TO DO SO IS RESTORED BY A COURT OF RECORD.

ANY DEFENDANT CONVICTED OF A SEX OFFENSE MUST REGISTER WITH THE COUNTY SHERIFF FOR THE COUNTY OF THE DEFENDANT'S RESIDENCE WITHIN 24 HOURS OF DEFENDANT'S RELEASE FROM CUSTODY. RCW 9A.44.130.

Office of Prosecuting Attorney
946 County-City Building
Tacoma, Washington 98402-21
Telephone: (253) 798-7400

96-1-04688-6

PURSUANT TO RCW 10.73.090 AND 10.73.100, THE DEFENDANT'S RIGHT TO FILE ANY KIND OF POST SENTENCE CHALLENGE TO THE CONVICTION OR THE SENTENCE MAY BE LIMITED TO ONE YEAR.

Date: Oct. 4, 2002

JUDGE

Presented by:

KAWYNE A. LUND, WSB# 19614
Deputy Prosecuting Attorney

Approved as to form:

ERIK BAUER, WSB# 14937
Lawyer for Defendant

lw

FILED
DEPT. 19
IN OPEN COURT

OCT 04 2002

Pierce County Clerk
By _____ DEPUTY

STATE OF WASHINGTON, County of Pierce ss: I, Kevin Stock, Clerk of the above entitled Court, do hereby certify that this foregoing instrument is a true and correct copy of the original now on file in my office. IN WITNESS WHEREOF, I hereunto set my hand and the Seal of said Court this _____ day of FEB 2009, 20____
Kevin Stock, Clerk
By _____ Deputy

CERTIFIED COPY

Office of Prosecuting Attorney
946 County-City Building
Tacoma, Washington 98402-21
Telephone: (253) 798-7400

APPENDIX F Cause No. 96-1-04688-6

The defendant having been sentenced to the Department of Corrections for a:

_____ sex offense
_____ serious violent offense
__✓__ assault in the second degree
__✓__ any crime where the defendant or an accomplice was armed with a deadly weapon
_____ any felony under 69.50 and 69.52 committed after July 1, 1988 is also sentenced to one (1) year term of community placement on these conditions:

The offender shall report to and be available for contact with the assigned community corrections officer as directed;

The offender shall work at Department of Corrections approved education, employment, and/or community service;

The offender shall not consume controlled substances except pursuant to lawfully issued prescriptions;

An offender in community custody shall not unlawfully possess controlled substances;

The offender shall pay community placement fees as determined by DOC;

The residence location and living arrangements are subject to the prior approval of the department of corrections during the period of community placement.

The offender shall submit to affirmative acts necessary to monitor compliance with court orders as required by DOC.

The Court may also order any of the following special conditions:

_____ (I) The offender shall remain within, or outside of, a specified geographical boundary:

_____

_____

__✓__ (II) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals: or their families immediate

_____

_____ (III) The offender shall participate in crime-related treatment or counseling services;

_____ (IV) The offender shall not consume alcohol;

_____ (V) The residence location and living arrangements of a sex offender shall be subject to the prior approval of the department of corrections; or

_____ (VI) The offender shall comply with any crime-related prohibitions.

_____ (VII)

Other: _____

_____

_____

Office of Prosecuting Attorney
946 County-City Building
Tacoma, Washington 98402-21
Telephone: (253) 798-7400

FILED
DEPT. 19
IN OPEN COURT

OCT 0 4 2002

Pierce County Clerk
By _____ DEPUTY

FINGERPRINTS

Right Hand
Fingerprint(s) of: RONNIE JACKSON, JR., Cause # 96-1-04688-6

Attested by: Bob San Soucie, CLERK.

By: DEPUTY CLERK _____ Date: _____

CERTIFICATE

OFFENDER IDENTIFICATION

I, Sandra J Rutter
Clerk of this Court, certify that the above is a true copy of the Judgment and Sentence in this action on record in my office.

Dated: 10-4-02

CLERK

By: Sandra J Rutter
DEPUTY CLERK

State I.D. # WA16423591

Date of Birth: 08/19/75

Sex : MALE

Race : BLACK

ORI _____

OCA _____

OIN _____

DOA _____

FINGERPRINTS

Office of Prosecuting Attorney
946 County-City Building
Tacoma, Washington 98402-21
Telephone: (253) 798-7400

APPENDIX "B"

Mandate/Opinion

CERTIFIED COPY

FILED
IN COUNTY CLERK'S OFFICE
A.M. JUN 0 8 2001 P.M.
PIERCE COUNTY, WASHINGTON
TED RUTT, COUNTY CLERK
BY _____ DEPUTY

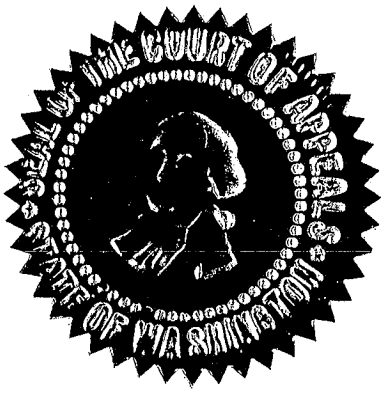
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DONNA MARIE SANTIAGO, Appellant.	No. 23342-8-II (consolidated) No. 23452-1-II MANDATE Pierce County Cause No. 96-1-04719-0, 96-1-04688-6
STATE OF WASHINGTON, Respondent, v. RONNIE JACKSON, Appellant.	

The State of Washington to: The Superior Court of the State of Washington
in and for Pierce County

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division II, filed on December 15, 2000 became the decision terminating review of this court of the above entitled case on June 5, 2001. Accordingly, this cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion. Costs on appeal will be awarded by further ruling of the court.



IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Tacoma, this 8th day of June, 2001.

Clerk of the Court of Appeals,
State of Washington, Div. II

Patricia Anne Pethick
Attorney At Law
PO Box 111952
Tacoma, WA. 98411-1952

William Richard Michelman
Attorney At Law
7512 Bridgeport Way W #b
Lakewood, WA. 98499-8377

John Christopher Hillman
Pierce County Deputy
Pros Attny
930 Tacoma Ave S Rm 946
Tacoma, WA. 98402

Marywave Van Deren
Pierce County Superior
Court Judge
930 Tacoma Avenue So.
Tacoma, WA. 98402

Indeterminate Sentence Review Board
P.O. Box 40907
Olympia, WA 98504-0907

STATE OF WASHINGTON, County of Pierce ss: I, Kevin Stock, Clerk of the above entitled Court, do hereby certify that this foregoing instrument is a true and correct copy of the original now on file in my office. IN WITNESS WHEREOF, I hereunto set my hand and the Seal of said Court this FEB 06 2009 day of _____, 20____
Kevin Stock, Clerk
By _____ Deputy

CERTIFIED COPY

CERTIFIED COPY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DONNA MARIE SANTIAGO, Appellant	No. 23342-8-II (consolidated)
STATE OF WASHINGTON, Respondent, v. RONNIE JACKSON, Appellant.	No. 23452-1-II UNPUBLISHED OPINION Filed: DEC 15 2000

ARMSTRONG, C.J. -- Donna Santiago and Ronnie Jackson appeal their convictions for attempted first degree murder, second degree assault, and first degree robbery. Santiago contends that the trial court (1) should have instructed on attempted manslaughter as a lesser-included offense, and (2) erred in instructing the jury on accomplice liability. Santiago also argues that the evidence was insufficient to convict her as an accomplice. Jackson argues that

the court (1) should have instructed on both attempted second degree murder and attempted manslaughter as lesser-included offenses and (2) erred by running the firearm enhancement on one count consecutive to firearm enhancements on the two other counts. Pro se, Jackson maintains that the information omitted an essential element of the attempted first degree murder charge, that the court's "to convict" instruction relieved the State of proving premeditation, and that the robbery and assault convictions were the same criminal conduct for sentencing purposes. The State concedes error in running the firearm enhancements consecutively; as to the other challenges, we find no error and, therefore, affirm the convictions.

FACTS

One afternoon in October 1996, Darrell Grace received a page from a number he did not recognize. He returned the call and spoke with Donna Santiago. Grace did not remember Santiago, but she told him they had met before. Later the same day, she again paged Grace and suggested that they go out together. When she suggested he come to her house in Tacoma, Grace said he did not know the area. She then suggested that they meet at the Tacoma Mall.

Grace told Santiago that he would bring his friend, Andre Manning, and asked her to find him a date too. Santiago replied that she had a friend who worked at the mall's movie theatre who might be able to join them. They agreed to meet at Nordstrom's shortly after 9 p.m. Santiago told Grace she would be driving a Ford Tempo. Santiago spoke to Ronnie Jackson, her former boyfriend, before she left.

Grace and Manning drove to the mall in a Mercedes-Benz that belonged to Grace's girlfriend. When they saw Santiago's car, they pulled up alongside it, and Santiago told them to

follow her. They drove over to the movie theatre and parked. Santiago approached Grace and said she would go into the theatre to see if her friend was ready. She came out a few minutes later and said that her friend would be getting off work soon, and asked whether Grace and Manning wanted to wait or drive around and come back. They decided to wait, and Santiago went back into the theatre.

Grace and Manning got out of the car and were urinating in the parking lot when Ronnie Jackson and another man approached them with guns. Jackson grabbed Grace by the neck and said, "Fool, this is a jack."[1] Grace gave Jackson his car keys, his jewelry, and his money. When Grace turned and tried to run, Jackson grabbed him again and shot him in the buttocks. He then forced Grace into the driver's seat of the Mercedes. At the same time, Manning fell to the ground when confronted by the other man, who then stood over him and tried to shoot him. The gun did not fire, and Manning got up and ran to a Tacoma Mall security booth for help.

Jackson got into the back seat of the Mercedes and his companion got in the front. When Grace saw a gun clip next to Jackson, he assumed Jackson's gun was unloaded, jumped from the car, and ran toward the movie theatre. Jackson got out of the car and ran after him, firing his gun. He followed Grace into the theatre lobby and fired at least twice, hitting Grace in the stomach. Grace collapsed in the lobby and Jackson fled, eventually running across Interstate 5.

Santiago was inside the theatre when the shooting occurred. On her way out, she asked a movie patron what had happened. When told that someone had been shot, she said, "That's too bad." She encountered Manning outside the theatre, told him Grace had been shot, and said she

[1] "Jack" is street terminology for robbery.

had to leave before the police arrived because she had an outstanding warrant. She moved her own car away from Grace's and was pulling Jackson's Monte Carlo out of its parking space when the police stopped her.

The State ultimately charged Ronnie Jackson, Tyler Williams, and Donna Santiago, as principals or accomplices, with two counts of attempted first degree murder (or, alternatively, first degree assault), one count of first degree robbery, and three counts of first degree reckless endangerment.

At trial, Grace and Manning described the initial contact with Santiago as well as the events that culminated in the shooting. When pressed during cross examination about whose idea it was to meet at the mall, Grace responded that "[w]e both agreed." Manning testified that he and Grace suggested the meeting at the mall and then Nordstrom's.

Jimmy Yu, who was working in the theatre ticket booth that night, testified that Santiago asked if she could enter to use the restroom. Yu allowed Santiago into the theatre, where she stayed for a few minutes before leaving. He saw her come back into the theatre a few minutes later without asking for permission. He then looked out into the parking lot and saw a man trying to shove someone into the driver's seat of a car. The driver escaped and ran into the theatre; the other man followed, shooting at him. Yu saw the shooter prop the lobby door open and fire two rounds into the theatre. There was a slight pause between shots. Three theatre patrons described the shooting as well. They each said that Jackson purposely tracked Grace with his gun while firing. One spent shell casing was recovered outside the theatre by the ticket booth and two more were recovered inside the theatre. There was a bullet hole in the door.

Other witnesses described the altercation in the parking lot and the assailants' eventual flight. One said that Jackson pursued Grace into the theatre even though his companion yelled at him to leave.

Officer Douglas Quantz was interviewing witnesses shortly after the shooting when he saw Santiago get into Jackson's Monte Carlo. Quantz stopped the car and asked Santiago what she was doing. Santiago first told Quantz that the car belonged to a girlfriend of hers who had asked her to come over and pick it up. She then changed her story and admitted that the car belonged to her ex-boyfriend, Ronnie Jackson. She added that she met Grace and Manning at the mall and agreed to go over to the theatre. She said she went inside to find a friend who worked there and later went into the bathroom because the gunshots made her sick. When Quantz searched Santiago's car, he found paperwork with Jackson's name on it.

Quantz detained Santiago and asked Officer Manuela Pearson to interview her further. Santiago first told Pearson that she did not have any idea what was going on. She claimed that she was attempting to move the Monte Carlo because she recognized it as Jackson's, knew it had recently been stolen, and wanted to move it so it would not be stolen again. When Pearson said her story did not make any sense, Santiago admitted that she came to the mall to meet Grace for a date. She said she did not know Grace was bringing a friend and that she went into the theatre to call someone to join them and also to use the restroom. She left the restroom when she heard shots and ran into Manning. She then went into the parking lot to leave, saw the Monte Carlo, and decided to "secure" it. When Pearson asked her why she left her date after he had been shot, she did not answer. Pearson thought it odd that Santiago met Grace and Manning at Nordstrom's

and then went to the theatre to use the telephone because there are several phones at the bus depot directly across from Nordstrom's.

When Detective Wulf Werner reinterviewed Santiago an hour later, she told him that she had a cousin who worked at the movie theatre. She also said she just happened to see Jackson's Monte Carlo after the shooting and decided to move it to a lighted area. She said Jackson was her former boyfriend and that she had spoken with him that night. Werner found paperwork with Santiago's name on it at Jackson's residence.

After the State rested, the court dismissed the three counts of reckless endangerment, but it denied Santiago's motion to dismiss all of the charges against her. Neither Santiago nor Jackson proposed lesser-included instructions on attempted second degree murder or attempted manslaughter.

The jury found Santiago and Jackson guilty of one count of attempted first degree murder of Grace, one count of second degree assault of Manning, and one count of first degree robbery of Grace and/or Manning. The jury also found that the defendants or an accomplice were armed with a firearm when they committed each crime. The jury could not reach a verdict for Tyler Williams.[2]

Before sentencing, Santiago moved for a new trial, arguing in part that there was insufficient evidence to support the jury's finding that she was an accomplice. Both she and Jackson also sought a new trial on the basis that they were entitled to instructions on attempted

[2] Williams pleaded guilty to robbery before Jackson and Santiago were sentenced, and admitted in his plea agreement that he, Jackson, and Santiago attempted to rob Grace.

second degree murder and attempted manslaughter as lesser offenses pursuant to *State v. Berlin,* 133 Wn.2d 541, 947 P.2d 700 (1997). The court denied these motions.

During sentencing, the court found that the attempted murder and robbery constituted the same criminal conduct. In sentencing Jackson, the court imposed standard range sentences on each count to be served concurrently and ordered the 60-month enhancements on the attempted murder and robbery counts to run concurrently to each other and the 36-month enhancement on the assault count to run consecutively to the other enhancements. The court ordered all enhancements to run consecutively to the underlying offenses, for a total sentence of 360 months.

In return for Santiago's cooperation,[3] the State agreed not to oppose her request for an exceptional sentence below the standard sentencing range. The trial court accepted the parties' recommendation and imposed an exceptional sentence of zero months with the deadly weapon enhancements running consecutively, for a total sentence of 96 months. Santiago's sentence was subsequently reduced to 60 months pursuant to *In re Post Sentencing of Charles,* 135 Wn.2d 239, 955 P.2d 798 (1998).

[3] After she was convicted, Santiago gave a statement in which she described meeting Jackson at the mall and learning that Grace and Manning owed him drug money. Jackson allegedly told her to lure them to a movie theatre on Union Avenue, but she brought them to the mall theatre instead, and went inside when she saw Jackson and Williams approaching. Both the State and Santiago argue now that this statement reinforces their positions on the sufficiency argument. Because this statement was not before the jury and was not offered as newly-discovered evidence, it will not be considered further.

ANALYSIS

I. Should the Trial Court Have Instructed on Attempted Second Degree Murder and Attempted Manslaughter as Lesser-Included or Inferior-Degree Crimes?

Three days after the jury returned its verdicts, the Washington Supreme Court issued its decision in *State v. Berlin*, 133 Wn.2d 541, 947 P.2d 700 (1997). In *Berlin*, the court reinstated the rule for instructing on lesser-included offenses set forth in *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978) and overruled the test set forth in *State v. Lucky*, 128 Wn.2d 727, 912 P.2d 483 (1996). *Berlin*, 133 Wn.2d at 548. The court held that to establish an offense as lesser-included, each of the elements of the lesser offense must be a necessary element of the offense charged, and the evidence in the case must support an inference that the lesser crime was committed. *Berlin*, 133 Wn.2d at 548 (citing *Workman*, 90 Wn.2d at 447-48).

Jackson and Santiago argued in a motion for new trial that under *Berlin*, they were entitled to lesser-included instructions. The trial court acknowledged that the law had changed, but it found that the evidence did not support a verdict of either attempted second degree murder or attempted manslaughter.

The State maintains that this issue has not been preserved for appellate review. Generally, the failure to give a particular instruction is not error if the instruction was not requested. *State v. Hoffman*, 116 Wn.2d 51, 111-12, 804 P.2d 577 (1991). Although errors affecting constitutional rights may be raised for the first time on appeal, the failure to instruct on a lesser-included offense is not such an error. *State v. Scott*, 110 Wn.2d 682, 688 n.5, 757 P.2d 492 (1988). But an issue raised in a motion for a new trial may be preserved for appellate review. *See State v. Fagalde*, 85 Wn.2d 730, 731, 539 P.2d 86 (1975) (citing *Seattle v.*

Harclaon, 56 Wn.2d 596, 354 P.2d 928 (1960)). Moreover, here the law pertaining to lesser-included offenses changed after the defendants were convicted but before they were sentenced. Accordingly, we address the merits of the issue.

1. Attempted Manslaughter

Jackson and Santiago maintain that they were entitled to lesser-included instructions on attempted manslaughter. They reason that because *Berlin* held that manslaughter in the first and second degrees are lesser-included offenses of murder in the first degree, attempted manslaughter must be a lesser-included offense of attempted murder in the first degree.

A person is guilty of manslaughter in the first degree when he recklessly causes the death of another person. RCW 9A.32.060. A person is guilty of manslaughter in the second degree when, with criminal negligence, he causes the death of another person. RCW 9A.32.070. Thus, neither crime requires an intent to kill, which is the element that differentiates manslaughter from murder. *See* RCW 9A.32.030, .050.

A person is guilty of attempting to commit a crime if, with intent to commit a specific crime, he does an act that is a substantial step toward the commission of that crime. RCW 9A.28.020(1). Where a crime is defined in terms of acts causing a particular result, a defendant charged with attempt must have specifically intended to accomplish that result. *State v. Dunbar,* 117 Wn.2d 587, 590, 817 P.2d 1360 (1991). At issue in *Dunbar* was whether the State could charge attempted murder by extreme indifference. Because the *mens rea* of extreme indifference murder does not require a defendant to intend to accomplish the criminal result of death, the court concluded that there could be no attempted extreme indifference murder. *Dunbar,* 117

Wn.2d at 594-95; *see also* 11A WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 100.02, at 220 (2d ed. 1994) (a crime defined by a particular result must include the intent to accomplish that result as an element in order for that crime to serve as a basis for the crime of attempt).

Similarly, a crime of "attempted manslaughter" is impossible under *Dunbar.* Manslaughter is defined by a particular result: death. But the intent to cause a death is not an element of manslaughter. Rather, in manslaughter the death is caused either recklessly or negligently. And a person cannot intend to act unintentionally. The trial court did not err by refusing to instruct on attempted manslaughter.

2. Attempted Second Degree Murder

Jackson also contends that he was entitled to a lesser-included/inferior-degree instruction on attempted second degree murder.

Second degree murder is both an inferior-degree offense and a lesser-included offense to first degree murder. *See State v. Bowerman,* 115 Wn.2d 794, 805, 802 P.2d 116 (1990) (legal prong of *Workman* test met because proving aggravated first degree murder necessarily includes proving the elements of second degree murder); *see also State v. Johnston,* 100 Wn. App. 126, 133-34, 996 P.2d 629, *review denied,* 11 P.3d 827 (2000) (State could amend an attempted first degree murder charge to attempted second degree murder because the attempted second degree murder was an inferior-degree of the charged crime.).

The factual test for both types of instruction is essentially the same: the evidence must raise an inference that only the lesser-included/inferior degree offense was committed to the exclusion of the charged offense. *State v Fernandez-Medina,* 141 Wn.2d 448, 6 P.3d 1150, 1154

(2000). The difference between first and second degree murder is premeditation. *State v. Brooks,* 97 Wn.2d 873, 876, 651 P.2d 217 (1982). Thus, the question is whether there is evidence that Jackson attempted to commit only intentional, rather than premeditated, murder.

Intent means acting only with the purpose to accomplish a result that constitutes a crime, while premeditation involves the "'mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short.'" *State v. Commodore,* 38 Wn. App. 244, 247, 684 P.2d 1364 (quoting *Brooks,* 97 Wn.2d at 876); *see also* RCW 9A.32.020(1) (premeditation must involve more than a moment in time). Premeditation also has been defined as "the deliberate formation of and reflection upon the intent to take a human life." *State v. Gentry,* 125 Wn.2d 570, 597, 888 P.2d 1105 (1995) (quoting *State v. Robtoy,* 98 Wn.2d 30, 43, 653 P.2d 284 (1982)). The law requires some time, however long or short, in which a design to kill is deliberately formed. *State v. Benn,* 120 Wn.2d 631, 658 n.4, 845 P.2d 289 (1993); *see also State v. Griffith,* 91 Wn.2d 572, 577, 589 P.2d 799 (1979) (premeditation found where defendant had brief "discussion" with victim, produced a gun and fired a shot).

The method of killing can be particularly relevant in establishing premeditation. *State v. Pirtle,* 127 Wn.2d 628, 644, 904 P.2d 245 (1995). Sufficient evidence of premeditation was found where a victim was shot three times in the head, twice after falling on the floor. *State v. Rehak,* 67 Wn. App. 157, 164, 834 P.2d 651 (1992); *see also State v. Sargent,* 40 Wn. App. 340, 353, 698 P.2d 598 (1985) (premeditation shown where defendant had sufficient time to pick up a weapon and deliver two blows to a prone victim). Where there is evidence that a killing occurred in the heat of passion, however, it is possible to find the absence of premeditation but

the presence of intent. *State v. Bolen,* 142 Wash. 653, 666, 254 P. 445 (1927). In *Bolen,* a second degree murder instruction was required because the jury had the right to believe that the killing was done during an argument and without the premeditation necessary to constitute murder in the first degree. *Bolen,* 142 Wash. at 666-67.

Although some sort of scuffle occurred here, as it perhaps did in *Bolen*, it was over when Jackson attempted to kill Grace. Jackson approached the scene with his gun drawn, used it once, and then chased Grace down and used it again. He fired one shot outside the theatre and two more inside. Had he fired only in the parking lot, the evidence might support an inference of an intentional shooting only. But Jackson opened the theatre door, aimed at the fleeing victim, and fired two more shots. The chase, deliberate aim, and multiple shots, following the events of the car jack, compel the conclusion that Jackson shot at Grace with premeditated intent to kill him. We hold that the factual prong of either the lesser-included test or inferior-degree test is not satisfied.[4]

II. Did the State Present Sufficient Evidence of Santiago's Accomplice Liability to Sustain Her Convictions?

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas,* 119 Wn.2d at 201. Circumstantial and direct evidence are equally

[4] Having rejected this issue on the merits, we need not address Jackson's contention that his attorney's failure to request these instructions constituted ineffective assistance.

reliable. *State v. Delmarter,* 94 Wn.2d 634, 638, 618 P.2d 99 (1980). We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton,* 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

A person is liable as an accomplice if: "(a) With knowledge that it will promote or facilitate the commission of the crime, he, . . . (ii) aids or agrees to aid such other person in planning or committing it[.]" RCW 9A.08.020(3). To aid and abet another person's criminal act, one must associate oneself with the undertaking, participate in it with the desire to bring it about, and seek to make it succeed by one's actions. *In re Welfare of Wilson,* 91 Wn.2d 487, 491, 588 P.2d 1161 (1979). "Mere knowledge or physical presence at the scene of a crime neither constitutes a crime nor will it support a charge of aiding and abetting a crime." *Wilson,* 91 Wn.2d at 491-92 (quoting *State v. Gladstone,* 78 Wn.2d 306, 474 P.2d 274 (1970)). But the State is not required to prove that the accomplice shared fully in the principal's criminal intent. *State v. Bockman,* 37 Wn. App. 474, 491, 682 P.2d 925 (1984).

Santiago argues that the State's case is flawed because it was based only upon her conduct after the attempted murder, robbery, and assault were complete; i.e., her movement of the cars and her conflicting statements to the police. She contends that such evidence is insufficient to show that she aided or agreed to aid in the crimes and cites as support *State v. Robinson,* 73 Wn. App. 851, 872 P.2d 43 (1994).

In *Robinson,* Division One found insufficient evidence to support a juvenile's conviction of second degree robbery based on accomplice liability. Robinson was driving his mother's car,

with several friends as passengers, when one friend jumped out of the car and stole a pedestrian's purse. When the friend got back into the car with the purse, Robinson panicked and drove off.

Because the robbery was complete by the time Robinson saw the purse, he could not have aided and abetted the crime. "He neither associated himself with [the] undertaking, participated in it with the desire to bring it about, nor sought to make the crime succeed by any actions of his own." *Robinson*, 73 Wn. App. at 857. Robinson's knowledge that his friend was struggling with a pedestrian and his mere presence at the scene could not amount to accomplice liability for his friend's crime. *Robinson*, 73 Wn. App. at 857.

A similar result is explained in *State v. Luna*, 71 Wn. App. 755, 862 P.2d 620 (1993). Luna was convicted, as an accomplice, of taking a motor vehicle without permission. Luna and some friends began an evening of vehicle prowling in a white Camaro that Chris drove. At one point, Chris stopped the Camaro and walked away, leaving Luna and the other occupants behind. Suddenly, Chris sped past the group in a red pickup truck. The other boys jumped back into the Camaro, with Luna driving, and followed the truck until it stopped on the freeway. Chris got out of the truck and back into the driver's seat of the Camaro, and Luna got into the back seat. A different juvenile then drove the truck recklessly and damaged it.

Division Three found the State's evidence insufficient to prove that Luna possessed the mental state required of an accomplice. There was no evidence that Luna knew of, or even suspected, Chris' intent before the theft occurred. Nor could it be concluded under the evidence that Luna, by following the stolen truck in the Camaro, promoted or facilitated the theft, or aided in stealing the truck. *Luna,* 71 Wn. App. at 759-60.

Viewing the evidence most favorably to the State, Jackson and Santiago were romantically involved shortly before the shooting, and they continued to have contact despite their breakup. Papers bearing Santiago's name were found in Jackson's home, and papers bearing Jackson's name were found in Santiago's car. Santiago initiated the contact with Grace and Manning, and she talked to Jackson before meeting the two men at the mall. And after meeting at Nordstrom's, Santiago directed Grace and Manning to the movie theatre on the pretext of either calling a friend or contacting someone who worked there. But when Santiago entered the theatre, she asked only to use the restroom. She then left almost immediately and returned to Grace's car. There, she told Grace and Manning that her friend would be off work soon and asked if they wanted to wait or drive around. This statement was false. Santiago did not contact a friend in the theatre.

Santiago emphasizes that the agreement to meet at Nordstrom's was mutual and that after she went into the theatre, she came back and gave Grace and Manning the choice of either waiting or driving around and coming back. This argument misses the thrust of the State's case: Santiago was instrumental in getting the victims to the theatre and even though she gave them the option of driving around, the men were to return.

Santiago's conduct after the shooting also supports the inference that she knew what was going to happen. She did not appear surprised or shocked when a movie patron told her that someone had been shot, nor did she attempt to check on Grace. When she ran into Manning, she told him she had to leave because she had an outstanding warrant, which was not true. She then moved her car away from Grace's and was trying to move Jackson's when the police stopped

her. She first told the police that she had no idea what was going on and that the Monte Carlo belonged to a girlfriend; she then admitted the planned date with Grace and that the car belonged to Jackson. This evidence is not consistent with her theory that she simply met Grace for a date. Rather, it supports the inference that she was trying to "cover up" after leading the victims to the crime scene.

In *State v. Toomey*, 38 Wn. App. 831, 690 P.2d 1175 (1984), we upheld the defendant's conviction as an accomplice of felony murder where the evidence showed that she planned a robbery with her boyfriend, carried his gun in her purse, and helped lure the victim into an alley. She could not avoid responsibility for the unanticipated shooting because she was not present during the attempted robbery. "An accomplice is guilty of any crime, including murder, committed or attempted by his associate, whether he is present or not. . . . Toomey's guilt flows from her aid in putting into operation the crime which generated the murder." *Toomey,* 38 Wn. App. at 840 (citations omitted).

The evidence here, as in *Toomey*, showed that Santiago helped plan a crime and played the major role in leading the victims to the scene. This case differs from both *Luna* and *Robinson,* where the crimes were not planned but were spur of the moment events conceived by the principals alone. In both *Luna* and *Robinson,* the evidence showed that the defendants participated only by helping the principals after the crimes had been committed. In contrast, Santiago's conduct and statements proved that she participated by helping plan and set up the crimes.

III. Was Santiago Prejudiced by the Trial Court's Accomplice Instruction and the State's Argument Concerning Accomplice Liability?

Santiago argues here that the trial court erred in instructing the jury on accomplice liability in the following manner:

> INSTRUCTION NO. 14
>
> A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable.
>
> A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.
>
> A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.
>
> A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:
>
> (1) Solicits, commands, encourages, or requests another person to commit the crimes; or
>
> (2) Aids or agrees to aid another person in planning or committing the crime.
>
> The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

Santiago contends that the State compounded this instructional error with the State's erroneous statements during closing argument that Santiago was "[i]n for a penny, in for a pound." The following comments are representative:

> You become a part of a criminal action. If you aid, you assist, and you know that it's going to be a crime, you are stuck. Even if, for example, you thought that it was just going to be a car jacking, the fact that it turned out that the people that you thought were just going to do the jacking go in a direction you maybe didn't want to go, you are stuck.
>
> . . .

> And so whether or not Ms. Santiago, for example, intended Mr. Grace to actually be hurt or not or Mr. Manning to be hurt or not, perhaps it would be better for her, but it is immaterial legally because she is an accomplice. . . .

Santiago's arguments fail for several reasons. First, Santiago proposed the language of instruction 14 to which she now objects. A defendant who requests an instruction cannot argue on appeal that the instruction was error. *State v. Henderson*, 114 Wn.2d 867, 868, 792 P.2d 514 (1990).

Second, Santiago's sole authority for her claim of instructional error has been withdrawn. *State v. Nguyen*, 94 Wn. App. 496, 972 P.2d 573, *reconsideration granted and opinion withdrawn,* 988 P.2d 460 (1999). Santiago claims that the case has been certified to the state Supreme Court, but to date there is no published opinion in the case.

Third, instruction 14 does not suffer from the problems that led to the finding of error in *Nguyen*, which was based on the court's dissatisfaction with an instruction that followed the language of WPIC 10.51 rather than RCW 9A.08.020.[5]

Santiago's complaints about the State's closing argument also fail. Santiago made no objection to these statements at trial. A defendant who fails to object to an improper remark waives any error unless the remark is "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997), *cert. denied,* 523 U.S. 1008 (1998).

Here, there was nothing improper to warrant an objection. Accomplice liability is premised on the following principles: (1) To convict of accomplice liability, the State need not

[5] Because *Nguyen* has been withdrawn, we will not examine it here, but we will observe only that instruction 14 followed the language of the statute in pertinent part.

prove that the principal and the accomplice shared the same mental state, (2) accomplice liability predicates criminal liability on general knowledge of a crime, rather than specific knowledge of the elements of the principal's crime, and (3) an accomplice, having agreed to participate in a criminal activity, runs the risk that the primary actor will exceed the scope of the preplanned activity. *See State v. Bockman*, 37 Wn. App. 474, 491, 682 P.2d 925 (1984); *State v. Davis,* 101 Wn.2d 654, 657-59, 682 P.2d 883 (1984). Therefore, the State's "[i]n for a penny, in for a pound" argument was not improper, and Santiago was not prejudiced thereby.

IV. Did the Trial Court Err by Running Jackson's Firearm Enhancement on Count II Consecutively to the Concurrent Enhancements on Counts I and III?

The State concedes that the trial court erred by running Jackson's firearm enhancement on count II consecutively to the concurrent enhancements on the other two counts. Under the version of RCW 9.94A.310(3)(e) in effect when Jackson's crimes were committed, the firearm enhancements ran concurrently to each other because the court ordered the underlying offenses to run concurrently. *See In re Post Sentencing of Charles*, 135 Wn.2d 239, 254, 955 P.2d 798 (1998).

V. Was the Amended Information Charging Jackson With Attempted First Degree Murder Defective Because it Failed to Include the "Substantial Step" Element of that Crime?

Jackson argues that the information was defective for failing to allege that he "attempted to cause the death of Darrell Grace" and, thus, omitted the "substantial step" element. Under RCW 9A.32.030(1)(a), a person is guilty of first degree murder when, with a premeditated intent to cause the death of another person, he or she causes the death of that person or a third person.

A person is guilty of a criminal attempt if, "with intent to commit a specific crime, he does any act which is a substantial step toward the commission of that crime." RCW 9A.28.020(1).

An accused is entitled to notice in the charging document of the nature and cause of the accusation against him, including all essential elements of the crime. *State v. Leach*, 113 Wn.2d 679, 689, 782 P.2d 552 (1989). When an information is challenged for the first time on appeal, as it is here, we read the information liberally in favor of validity. *State v. Kjorsvik*, 117 Wn.2d 93, 105, 812 P.2d 86 (1991). Thus, we uphold the information if the missing element may "be fairly implied from language within the charging document." *Kjorsvik*, 117 Wn.2d at 104; *see also State v. Campbell*, 125 Wn.2d 797, 801-02, 888 P.2d 1185 (1995). If the information contains allegations of the crime that was meant to be charged, it is sufficient even though it does not contain the statutory language. *Campbell*, 125 Wn.2d at 801.

The amended information charged Jackson with attempted first degree murder in the following manner:

> I, JOHN W. LADENBURG, Prosecuting Attorney ... do accuse RONNIE JACKSON, JR., ... of the crime of ATTEMPTED MURDER IN THE FIRST DEGREE, committed as follows:
>
> That RONNIE JACKSON, JR., [and others], as principles and/or accomplices pursuant to RCW 9A.08.020, . . . did unlawfully and feloniously with premeditated intent to cause the death of another person, did repeatedly shoot with a semi-automatic handgun at Darrell Grace, a human being, on or about the 22nd day of October, 1996, contrary to RCW 9A.28.020 and RCW 9A.32.030(1)(a), . . .

Here, the amended information informed Jackson that he was being charged with attempted first degree murder. The word "attempted" necessarily implied that he took one or more steps toward accomplishing murder. *See State v. Berglund*, 65 Wn. App. 648, 651, 829

P.2d 247 (1992). Moreover, the information described the crime charged: shooting at Grace with the premeditated intent to cause his death.

If a liberal reading finds the necessary elements, as is the case here, we then examine whether the defendant can show that the inartful language caused actual prejudice. *State v. McCarty*, 140 Wn.2d 420, 425, 998 P.2d 296 (2000) (citing *Kjorsvik*, 117 Wn.2d at 105-06). Jackson does not claim that he was prejudiced by the failure of the information to specifically allege that he took a substantial step toward killing Grace. Indeed, his attorney proposed an instruction containing the "substantial step" element, and the trial court instructed the jury that to convict Jackson of attempted first degree murder it must find, beyond a reasonable doubt, that he took a "substantial step" toward murdering Grace. *See Kjorsvik*, 117 Wn.2d at 111 (court can consider "to convict" instruction in evaluating claim of prejudice resulting from defective charging document).[6] Jackson has not shown that the amended information, read liberally, was either defective or prejudicial.

VI. Did the Court's "To Convict" Instruction on Attempted First Degree Murder Relieve the State of the Need to Prove Premeditation?

Jackson contends that because the "to convict" instruction on attempted first degree murder did not refer to premeditation, it was constitutionally deficient.

The "to convict" instruction provided in part:

> To convict the defendant Ronnie Jackson, Jr., of the crime of attempted murder in the first degree . . . each of the following elements of the crime must be proved beyond a reasonable doubt:

[6] *McCarty* criticized this court for looking to trial events to show a lack of prejudice despite an insufficient information. *McCarty*, 140 Wn.2d at 427. *McCarty* did not challenge *Kjorsvik*, however, for allowing an examination of trial events to determine prejudice resulting from an adequate, though inartfully phrased, charging document.

> (1) That . . . the defendant or an accomplice did an act which was a substantial step toward the commission of murder in the first degree;
>
> (2) That the act was done with the intent to commit murder in the first degree;
>
> . . .

The court set forth the elements of first degree murder, including "[t]hat the intent to cause the death was premeditated," in instruction 9.

Jackson's primary support for his claim of error is *State v. Smith*, 131 Wn.2d 258, 930 P.2d 917 (1997). At issue in *Smith* was the validity of a "to convict" instruction that defined the elements of conspiracy to commit first degree murder. The court observed that a "to convict" instruction must contain all of the elements of the crime because it serves as a "yardstick" by which the jury measures the evidence to determine guilt or innocence. *Smith*, 131 Wn.2d at 263 (citing *State v. Emmanuel*, 42 Wn.2d 799, 819, 259 P.2d 845 (1953)). The court found that instead of listing the elements of conspiracy to commit first degree murder, the instruction at issue described the crime of conspiracy to commit conspiracy to commit murder. *Smith*, 131 Wn.2d at 262. The instruction thus was constitutionally defective because it purported to be a complete statement of the law yet stated the wrong underlying crime that the conspirators agreed to carry out. *Smith*, 131 Wn.2d at 263.

But the Supreme Court noted that the trial court "correctly defined 'first degree murder' in a separate instruction." *Smith*, 131 Wn.2d at 261. The flaw thus was in improperly setting forth the elements of conspiracy to commit murder, not in failing to set forth the elements of first degree murder in the same instruction.

Finally, the comments following the pattern jury instruction for criminal attempt provide that "[i]f the basic charge is an attempt to commit a crime, a separate elements instruction must be given delineating the elements of that crime." 11A WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 100.02, at 219 (2d ed. 1994). The trial court complied with this practice, and Jackson has not shown any error.

VII. Should the Trial Court Have Considered the Robbery and Assault Convictions as the Same Criminal Conduct for Sentencing Purposes?

Jackson argues that the trial court erred in calculating his offender score. He contends that his convictions for second degree assault and first degree robbery either merged or involved the same criminal conduct.

When a defendant is sentenced for two or more current offenses, the trial court determines the sentence range for each offense by adding together all other current and prior offenses. If it finds that all or some of the current offenses are the same criminal conduct, the court may count them as one crime. Offenses involve the same criminal conduct only if they share the same criminal intent, are committed at the same time and place, and involve the same victim. RCW 9.94A.400(1)(a). This statute is narrowly construed to disallow most claims of same criminal conduct. *State v. Palmer*, 95 Wn. App. 187, 190-91, 975 P.2d 1038 (1999).

"'A trial court's determination of what constitutes the same criminal conduct for purposes of calculating an offender score will not be reversed absent an abuse of discretion or misapplication of the law.'" *State v. Tili*, 139 Wn.2d 107, 122, 985 P.2d 365 (1999) (quoting *State v. Walden*, 69 Wn. App. 183, 188, 847 P.2d 956 (1993)). A finding of same criminal conduct is precluded where multiple crimes involve different victims. *Tili*, 139 Wn.2d at 123. In

addition, convictions of crimes involving multiple victims must be treated separately. *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987); *State v. Hollis*, 93 Wn. App. 804, 817, 970 P.2d 813, *review denied*, 137 Wn.2d 1038 (1999). Where a defendant was convicted of burglary and kidnapping, the fact that the burglary involved multiple victims required the two offenses to be considered as separate offenses for offender score purposes. *State v. Lessley*, 118 Wn.2d 773, 779, 827 P.2d 996 (1992).

Thus, a finding of same criminal conduct is not warranted if a defendant's crimes involved different victims or multiple victims. In this case, the jury convicted Jackson of robbing Grace and/or Manning and of assaulting Manning. The trial court thus could have concluded, in its discretion, that the robbery involved multiple victims or a different victim than that involved in the assault. The trial court did not err in treating the offenses as separate.

The concept of merger is inapplicable as well. Crimes merge when proof of one is necessary to prove an element or the degree of another crime. *State v. Vladovic*, 99 Wn.2d 413, 419, 662 P.2d 853 (1983). But if one of the crimes involves an injury that is separate and distinct from that of the other, the crimes do not merge. *See Vladovic*, 99 Wn.2d at 421 (holding that because the robbery and kidnappings involved different people, they created separate injuries and could not merge). As explained above, the victims of the robbery and the assault were not necessarily the same, and merger was not appropriate.

We affirm but remand for resentencing on the firearm enhancements.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

ARMSTRONG, C.J.

We concur:

SEINFELD, J.

WOOD, J.P.T.[7]

[7] Judge Wood is serving as a judge pro tempore of the Court of Appeals, Division II, pursuant to CAR 21.

APPENDIX "C"

RCW 9.94A.310(1)- Sentencing Grid

TABLE 1
RCW 9.94A.310(1) -- SENTENCING GRID
FOR CRIMES COMMITTED AFTER JUNE 30, 1990

SERIOUSNESS LEVEL	OFFENDER SCORE									
	0	1	2	3	4	5	6	7	8	9 or more
XV	Life Sentence without Parole/Death Penalty									
XIV	23y 4m 240 - 320	24y 4m 250 - 333	25y 4m 261 - 347	26y 4m 271 - 361	27y 4m 281 - 374	28y 4m 291 - 388	30y 4m 312 - 416	32y 10m 338 - 450	36y 370 - 493	40y 411 - 548
XIII	12y 123 - 164	13y 134 - 178	14y 144 - 192	15y 154 - 205	16y 165 - 219	17y 175 - 233	19y 195 - 260	21y 216 - 288	25y 257 - 342	29y 298 - 397
XII	9y 93 - 123	9y 11m 102 - 136	10y 9m 111 - 147	11y 8m 120 - 160	12y 6m 129 - 171	13y 5m 138 - 184	15y 9m 162 - 216	17y 3m 178 - 236	20y 3m 209 - 277	23y 3m 240 - 318
XI	7y 6m 78 - 102	8y 4m 86 - 114	9y 2m 95 - 125	9y 11m 102 - 136	10y 9m 111 - 147	11y 7m 120 - 158	14y 2m 146 - 194	15y 5m 159 - 211	17y 11m 185 - 245	20y 5m 210 - 280
X	5y 51 - 68	5y 6m 57 - 75	6y 62 - 82	6y 6m 67 - 89	7y 72 - 96	7y 6m 77 - 102	9y 6m 98 - 130	10y 6m 108 - 144	12y 6m 129 - 171	14y 6m 149 - 198
IX	3y 31 - 41	3y 6m 36 - 48	4y 41 - 54	4y 6m 46 - 61	5y 51 - 68	5y 6m 57 - 75	7y 6m 77 - 102	8y 6m 87 - 116	10y 6m 108 - 144	12y 6m 129 - 171
VIII	2y 21 - 27	2y 6m 26 - 34	3y 31 - 41	3y 6m 36 - 48	4y 41 - 54	4y 6m 46 - 61	6y 6m 67 - 89	7y 6m 77 - 102	8y 6m 87 - 116	10y 6m 108 - 144
VII	18m 15 - 20	2y 21 - 27	2y 6m 26 - 34	3y 31 - 41	3y 6m 36 - 48	4y 41 - 54	5y 6m 57 - 75	6y 6m 67 - 89	7y 6m 77 - 102	8y 6m 87 - 116
VI	13m 12+ - 14	18m 15 - 20	2y 21 - 27	2y 6m 26 - 34	3y 31 - 41	3y 6m 36 - 48	4y 6m 46 - 61	5y 6m 57 - 75	6y 6m 67 - 89	7y 6m 77 - 102
V	9m 6 - 12	13m 12+ - 14	15m 13 - 17	18m 15 - 20	2y 2m 22 - 29	3y 2m 33 - 43	4y 41 - 54	5y 51 - 68	6y 62 - 82	7y 72 - 96
IV	6m 3 - 9	9m 6 - 12	13m 12+ - 14	15m 13 - 17	18m 15 - 20	2y 2m 22 - 29	3y 2m 33 - 43	4y 2m 43 - 57	5y 2m 53 - 70	6y 2m 63 - 84
III	2m 1 - 3	5m 3 - 8	8m 4 - 12	11m 9 - 12	14m 12+ - 16	20m 17 - 22	2y 2m 22 - 29	3y 2m 33 - 43	4y 2m 43 - 57	5y 51 - 68
II	0 - 90 Days	4m 2 - 6	6m 3 - 9	8m 4 - 12	13m 12+ - 14	16m 14 - 18	20m 17 - 22	2y 2m 22 - 29	3y 2m 33 - 43	4y 2m 43 - 57
I	0 - 60 Days	0 - 90 Days	3m 2 - 5	4m 2 - 6	5m 3 - 8	8m 4 - 12	13m 12+ - 14	16m 14 - 18	20m 17 - 22	2y 2m 22 - 29

I	0 - 60 Days	0 - 90 Days	3m 2 - 5	4m 2 - 6	5m 3 - 8	8m 4 - 12	13m 12+ - 14	16m 14 - 18	20m 17 - 22	2y 2m 22 - 29

NOTE: Numbers in the first horizontal row of each seriousness category represent sentencing midpoints in years(y) and months(m). Numbers in the second and third rows represent presumptive sentencing ranges in months, or in days if so designated. 12+ equals one year and one day.

(2) For persons convicted of the anticipatory offenses of criminal attempt, solicitation, or conspiracy under chapter 9A.28 RCW, the presumptive sentence is determined by locating the sentencing grid sentence range defined by the appropriate offender score and the seriousness level of the completed crime, and multiplying the range by 75 percent.

(3) The following additional times shall be added to the presumptive sentence for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any firearm enhancements based on the classification of the completed felony crime. If the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW to commit one of the crimes listed in this subsection as eligible for any firearm enhancements, the following additional times shall be added to the presumptive sentence determined under subsection (2) of this section based on the felony crime of conviction as classified under RCW 9A.28.020:

(a) Five years for any felony defined under any law as a class A felony or with a maximum sentence of at least twenty years, or both, and not covered under (f) of this subsection.

(b) Three years for any felony defined under any law as a class B felony or with a maximum sentence of ten years, or both, and not covered under (f) of this subsection.

(c) Eighteen months for any felony defined under any law as a class C felony or with a maximum sentence of five years, or both, and not covered under (f) of this subsection.

(d) If the offender is being sentenced for any firearm enhancements under (a), (b), and/or (c) of this subsection and the offender has previously been sentenced for any deadly weapon enhancements after July 23, 1995, under (a), (b), and/or (c) of this subsection or subsection (4) (a), (b), and/or (c) of this section, or both, any and all firearm enhancements under this subsection shall be twice the amount of the enhancement listed.

(e) Notwithstanding any other provision of law, any and all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall not run concurrently with any other sentencing provisions.

(f) The firearm enhancements in this section shall apply to all felony crimes except the following: Possession of a machine gun, possessing a stolen firearm, reckless endangerment in the first degree, theft of a firearm, unlawful possession of a firearm in the first and second degree, and use of a machine gun in a felony.

(g) If the presumptive sentence under this section exceeds the statutory maximum for the offense, the statutory maximum sentence shall be the presumptive sentence unless the offender is a persistent offender as defined in RCW 9.94A.030.

(4) The following additional times shall be added to the presumptive sentence

for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a deadly weapon as defined in this chapter other than a firearm as defined in RCW 9.41.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any deadly weapon enhancements based on the classification of the completed felony crime. If the offender or an accomplice was armed with a deadly weapon other than a firearm as defined in RCW 9.41.010 and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW to commit one of the crimes listed in this subsection as eligible for any deadly weapon enhancements, the following additional times shall be added to the presumptive sentence determined under subsection (2) of this section based on the felony crime of conviction as classified under RCW 9A.28.020:

(a) Two years for any felony defined under any law as a class A felony or with a maximum sentence of at least twenty years, or both, and not covered under (f) of this subsection.

(b) One year for any felony defined under any law as a class B felony or with a maximum sentence of ten years, or both, and not covered under (f) of this subsection.

(c) Six months for any felony defined under any law as a class C felony or with a maximum sentence of five years, or both, and not covered under (f) of this subsection.

(d) If the offender is being sentenced under (a), (b), and/or (c) of this subsection for any deadly weapon enhancements and the offender has previously been sentenced for any deadly weapon enhancements after July 23, 1995, under (a), (b), and/or (c) of this subsection or subsection (3) (a), (b), and/or (c) of this section, or both, any and all deadly weapon enhancements under this subsection shall be twice the amount of the enhancement listed.

(e) Notwithstanding any other provision of law, any and all deadly weapon enhancements under this section are mandatory, shall be served in total confinement, and shall not run concurrently with any other sentencing provisions.

(f) The deadly weapon enhancements in this section shall apply to all felony crimes except the following: Possession of a machine gun, possessing a stolen firearm, reckless endangerment in the first degree, theft of a firearm, unlawful possession of a firearm in the first and second degree, and use of a machine gun in a felony.

(g) If the presumptive sentence under this section exceeds the statutory maximum for the offense, the statutory maximum sentence shall be the presumptive sentence unless the offender is a persistent offender as defined in RCW 9.94A.030.

(5) The following additional times shall be added to the presumptive sentence if the offender or an accomplice committed the offense while in a county jail or state correctional facility as that term is defined in this chapter and the offender is being sentenced for one of the crimes listed in this subsection. If the offender or an accomplice committed one of the crimes listed in this subsection while in a county jail or state correctional facility as that term is defined in this chapter, and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW to commit one of the crimes listed in this subsection, the following additional times shall be added to the presumptive sentence determined under subsection (2) of this

section:

(a) Eighteen months for offenses committed under RCW 69.50.401(a)(1) (i) or (ii) or 69.50.410;

(b) Fifteen months for offenses committed under RCW 69.50.401(a)(1) (iii), (iv), and (v);

(c) Twelve months for offenses committed under RCW 69.50.401(d).

For the purposes of this subsection, all of the real property of a state correctional facility or county jail shall be deemed to be part of that facility or county jail.

(6) An additional twenty-four months shall be added to the presumptive sentence for any ranked offense involving a violation of chapter 69.50 RCW if the offense was also a violation of RCW 69.50.435. [1996 c 205 § 5; 1995 c 129 § 2 (Initiative Measure No. 159); (1994 sp.s. c 7 § 512 repealed by 1995 c 129 § 19 (Initiative Measure No. 159)); 1992 c 145 § 9; 1991 c 32 § 2; 1990 c 3 § 701. Prior: 1989 c 271 § 101; 1989 c 124 § 1; 1988 c 218 § 1; 1986 c 257 § 22; 1984 c 209 § 16; 1983 c 115 § 2.]

Findings and intent—1995 c 129 (Initiative Measure No. 159): "(1) The people of the state of Washington find and declare that:

(a) Armed criminals pose an increasing and major threat to public safety and can turn any crime into serious injury or death.

(b) Criminals carry deadly weapons for several key reasons including: Forcing the victim to comply with their demands; injuring or killing anyone who tries to stop the criminal acts; and aiding the criminal in escaping.

(c) Current law does not sufficiently stigmatize the carrying and use of deadly weapons by criminals, and far too often there are no deadly weapon enhancements provided for many felonies, including murder, arson, manslaughter, and child molestation and many other sex offenses including child luring.

(d) Current law also fails to distinguish between gun-carrying criminals and criminals carrying knives or clubs.

(2) By increasing the penalties for carrying and using deadly weapons by criminals and closing loopholes involving armed criminals, the people intend to:

(a) Stigmatize the carrying and use of any deadly weapons for all felonies with proper deadly weapon enhancements.

(b) Reduce the number of armed offenders by making the carrying and use of the deadly weapon not worth the sentence received upon conviction.

(c) Distinguish between the gun predators and criminals carrying other deadly weapons and provide greatly increased penalties for gun predators and for those offenders committing crimes to acquire firearms.

(d) Bring accountability and certainty into the sentencing system by tracking individual judges and holding them accountable for their sentencing practices in relation to the state's sentencing guidelines for serious crimes." [1995 c 129 § 1 (Initiative Measure No. 159).]

Comment

The 1986 amendments provided that the 12-month deadly weapon penalty applies to those offenses defined in RCW 9.94A.030(16) as drug offenses, instead of applying only to Delivery or Possession of a Controlled Substance with Intent to Deliver. The term "drug offense," as defined in the SRA, excludes simple possession, forged prescriptions, and violations of the Legend Drug Act.

APPENDIX "D"

RCW 9.94A.125

RCW 9.94A.125 Deadly weapon special verdict—Definition. In a criminal case wherein there has been a special allegation and evidence establishing that the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, the court shall make a finding of fact of whether or not the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, or if a jury trial is had, the jury shall, if it find[s] the defendant guilty, also find a special verdict as to whether or not the defendant or an accomplice was armed with a deadly weapon at the time of the commission of the crime.

For purposes of this section, a deadly weapon is an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death. The following instruments are included in the term deadly weapon: Blackjack, sling shot, billy, sand club, sandbag, metal knuckles, any dirk, dagger, pistol, revolver, or any other firearm, any knife having a blade longer than three inches, any razor with an unguarded blade, any metal pipe or bar used or intended to be used as a club, any explosive, and any weapon containing poisonous or injurious gas. [1983 c 163 § 3.]

APPENDIX "E"

RCW 9.94A.370

RCW 9.94A.370 Presumptive sentence. (1) The intersection of the column defined by the offender score and the row defined by the offense seriousness score determines the presumptive sentencing range (see RCW 9.94A.310, (Table 1)). The additional time for deadly weapon findings or for those offenses enumerated in RCW 9.94A.310(4) that were committed in a state correctional facility or county jail shall be added to the entire presumptive sentence range. The court may impose any sentence within the range that it deems appropriate. All presumptive sentence ranges are expressed in terms of total confinement.

(2) In determining any sentence, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing. Acknowledgement includes not objecting to information stated in the presentence reports. Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point. The facts shall be deemed proved at the hearing by a preponderance of the evidence. Facts that establish the elements of a more serious crime or additional crimes may not be used to go outside the presumptive sentence range except upon stipulation or when specifically provided for in *RCW 9.94A.390(2) (c), (d), (f), and (g). [1996 c 248 § 1; 1989 c 124 § 2; 1987 c 131 § 1; 1986 c 257 § 26; 1984 c 209 § 20; 1983 c 115 § 8.]